Filed 1/13/09 In re T.G. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T.G., Jr., a Person Coming Under the Juvenile Court Law.	B202108 (Los Angeles County Super. Ct. No. CK69830)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.G., Sr., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Joan Carney, Referee. Affirmed.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Respondent H.W.

INTRODUCTION

T.G. appeals from an order of the juvenile court denying him presumed father status in the dependency proceedings regarding T.G, Jr. He contends the juvenile court erred in awarding presumed father status instead to H.W., the child's biological father, because T.G. had signed a voluntary declaration of paternity when the child was born, thus conclusively establishing T.G.'s paternity, and there was no basis upon which to set aside the voluntary declaration, which operated as a judgment of paternity. We disagree and affirm the court's order granting presumed father status to H.W.

FACTUAL AND PROCEDURAL BACKGROUND

Initiation of Dependency Proceedings

T.G., Jr. (known to his family as, and referred to herein as "TJ," born in July 2001) and his half-brother, A.M. (born in February 1996), came to the attention of DCFS in September 2007, based upon a referral indicating TJ had suffered emotional abuse due to witnessing domestic violence between J.S. (Mother) and T.G., Sr. (hereafter T.G.). DCFS filed a section 300 petition, alleging that Mother and T.G., Sr. had a six-year history of engaging in domestic violence in the children's presence, that T.G. had a history of substance abuse and was a current abuser of cocaine and alcohol, and that A.M.'s father, P.M., had failed to provide A.M. with the necessities of life.[1]

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[1] Mother, A.M., and A.M.'s presumed father are not parties to this appeal.

Mother told a social worker that either Henry W. or H.W. could be the biological father of TJ.[2] She became romantically involved with T.G. after she was pregnant with TJ. T.G. came to the hospital when TJ was born, and Mother and T.G. directed the medical staff to indicate T.G. was the father. He is listed on TJ's birth certificate as the father.

Mother acknowledged to the social worker that her relationship with T.G. was problematic. He made fun of her, treated her like his property, threatened to take TJ away from her, physically used her for his own needs, drank excessively, and had been incarcerated. Mother did not want to continue her relationship with T.G., but was afraid to leave him because she thought he would control her, become violent, or abuse the children to persuade her to stay with him.

When the social worker attempted to detain TJ, T.G. became aggressive and violent toward Mother. Police assistance was required to remove the children from the home. T.G.'s speech was slurred and he appeared to be under the influence of alcohol. TJ initially was placed in Mother's physical custody.

H.W. said he believed he was TJ's biological father, and wanted DNA testing to rule out Henry W. as the father. TJ told the social worker he lived with his "fake" father, T.G., and Mother. TJ said his real father, *Henry W.*, was in prison.[3] He denied being abused or witnessing domestic violence, but said he did not want to live with T.G. He said T.G. was mean, yelled at him and Mother, and made Mother sad. T.G. admitted to the social worker he had been in prison at least

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[2] For purposes of confidentiality, we refer to H.W. (with whom TJ was placed after the present appeal was filed) by his initials, given that his first name is more unusual than Henry W.'s, and their initials are the same.

[3] This conflicts with later statements that TJ believed H.W. to be his father, but the discrepancy is not explained.

three times, and had a substance abuse problem in the past but had been clean for two years.

The Statements Regarding Parentage

On September 6, 2007, T.G. filed a statement regarding parentage (Judicial Council form JV-505) indicating he believed he was TJ's father and requesting that the court enter a judgment of paternity. He indicated he had lived with TJ since the child's birth and participated in parental activities. He did not check the box on the form to indicate that parentage had been established by way of a voluntary declaration. At a hearing on September 6, 2007, at which Mother, T.G. and H.W. were present, the court stated that Mother and both fathers agreed that TJ believes that H.W. is his father. H.W. agreed, and Mother and T.G., and their respective counsel, did not object or disagree. The court ordered genetic testing to establish paternity, listing T.G., H.W., and Henry W. as the people to be tested. The court found T.G., H.W., and Henry W. to be the alleged fathers of TJ, and said it would decide the paternity issues at the disposition hearing. Mother emphasized to the court that she met T.G. after she was pregnant with TJ.

H.W. also filed a JV-505 form, indicating that he told family, friends, and his community that TJ was his child. TJ spent time with H.W.'s family, and H.W. sometimes took the child to school and helped with his homework.

The Amended Petition and the Adjudication of Dependency

In October 2007, DCFS filed an amended petition alleging that Mother suffers from mental health problems that interfere with her ability to care for the children. She had stopped taking her psychotropic medication, and was unable to independently care for the children. Mother and the children had been living with T.G.'s mother (who is Mother's uncle's girlfriend), and T.G. lived on the same

property. However, she had recently moved to the home of A.M.'s paternal grandmother. The paternal grandmother expressed doubt about whether Mother could remain there, because Mother required so much care and it was difficult for her to take care of Mother and the boys. The grandmother said that H.W. lived nearby and took care of the boys while she was at work.

At the adjudication hearing on October 2, 2007, TJ's half-brother A.M. (then 11 years old) testified (and T.G. admitted) that T.G. drank several beers almost every day. T.G. and Mother fought frequently, and Mother would cry and lock T.G. out of the room she shared with the boys. T.G. once threatened to take TJ and run away with him. T.G. occasionally hit Mother. Mother also testified that she and T.G. fought frequently, and that he occasionally hit her.

The court found A.M. and TJ to be dependents of the court, sustained the first amended petition (as further amended), and detained the children, ordering them to be suitably placed in the home of A.M.'s paternal grandmother.

The Determination of Paternity

Genetic testing revealed that H.W. is TJ's biological father. However, T.G. and H.W. each filed a petition requesting that the court grant him presumed father status.

H.W. told the social worker that Mother had told him he might be TJ's father, but he was not certain. When TJ was born, H.W. did not see him frequently; he only saw TJ when Mother could "get away." H.W.'s contact with TJ increased when the child was about two years old. He sent money for TJ whenever Mother requested it, and sometimes bought TJ clothing and toys. He did not have regular visitation with TJ until the court became involved, after which he visited him two or three times per week. H.W. believed T.G. became TJ's father in

order to keep Mother under control and keep her in his home. DCFS recommended that H.W. be provided with family reunification services.

The court held a hearing regarding paternity for two days during February and March 2008. Mother's counsel indicated she wished to cross-examine H.W., and would call T.G. to testify. However, the court asked counsel to instead make an offer of proof as to what T.G. would say. Counsel indicated T.G. would testify that he knew when TJ was born that he was not the child's father, but he wanted to take responsibility for the child. He signed a voluntary declaration of paternity, brought the child into his home, and treated the child as his own from birth until the section 300 petition was filed. T.G. would testify that H.W. had no contact with TJ for the first few years of his life, and had perhaps monthly contact with TJ thereafter. H.W. provided limited financial support for the child.

In response to the court's questions, H.W. stated that he knew TJ might be his son when he first saw the child's picture. H.W. did not know Mother's address until the child was about two years old. H.W. lived in Long Beach and Mother and TJ lived in Sun Valley, which took three hours to reach on public transportation. H.W. began giving Mother about $100 per month when TJ was three years old.

TJ's counsel indicated to the court, without objection from T.G.'s counsel, that TJ knows H.W. as his "true" father. H.W.'s counsel pointed out that H.W. had filed a declaration representing that he had supported TJ, had been involved in his life, including taking him to school and helping him with homework, and had held the child out as his own to his family and community. Counsel argued that it was in TJ's best interest that H.W. be declared the presumed father.

Mother's counsel indicated that Mother was adamant that H.W. should be found the presumed father. Mother said she contacted H.W. when TJ was about six months old, and H.W. started sending her money and visiting with the child around that time. She would bring TJ to Long Beach for visits with H.W.

Mother's counsel opined that the discrepancy between H.W.'s and Mother's testimony about when visits began taking place was a matter of semantics. Mother never intended or wished to raise the child with T.G. as his father. The court commented that "she sure lived with him long enough." Mother's counsel disagreed, clarifying that the residence was owned by T.G.'s mother, who lived with Mother's uncle. Mother and T.G. resided on the same property, but never lived together in any kind of relationship or as a family.

TJ's counsel argued that H.W. should be named the presumed father; TJ had expressed the desire that H.W. be found his presumed father, and that he be allowed to live with H.W. Counsel argued it was in the child's best interest that H.W. be named his presumed father.

Counsel for DCFS pointed out that H.W. was necessarily asking to have the voluntary declaration of paternity filed by T.G. set aside, and argued that the court had the power to do so. DCFS's counsel stated that the statutory factors the court would be required to consider (Fam. Code, § 7611, subd. (d)) weighed more heavily in favor of H.W. TJ had spent time with H.W. during summer vacations, for example, and H.W. had held TJ out as his son.

T.G.'s counsel argued that T.G. should be found the presumed father based upon his having signed the voluntary declaration of paternity, and "without any type of fraud, the court should uphold" that declaration.

The court took the matter under submission, and at the next hearing found H.W. to be TJ's presumed father. This appeal followed.

DISCUSSION

T.G. contends on appeal that his paternity of TJ was conclusively established because he executed a voluntary declaration of paternity when TJ was born. He contends that the voluntary declaration of paternity could only be set aside as

permitted by Family Code sections 7575 and 7630, and those statutory requirements were not met here. We disagree and conclude that the voluntary declaration was properly set aside, and H.W. was properly declared TJ's presumed father.

The Standard of Review, and the Applicable Law Regarding Presumed Fathers

Upon review of the juvenile court's determination of presumptive fatherhood, we must "review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. 'We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found for the respondent.' [Citation.]" (*Miller v. Miller* (1998) 64 Cal.App.4th 111, 117-118.)

"In order to become a 'presumed' father, a man must fall within one of several categories enumerated in Family Code section 7611. Under Family Code section 7611, a man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity. (See Fam. Code, §§ 7611, 7570; *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050-1051; *In re Liam L.* (2000) 84 Cal.App.4th 739.) Only a presumed father is entitled to custody and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449, 451.)" (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595-596. See also *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1354-1355.)

Here, T.G. took TJ into his home and held the child out as his own. This, however, was insufficient to confer presumed father status, because T.G. did not hold TJ out as his *natural* child. It was understood by everyone involved, including TJ, that T.G. was not his biological father.

T.G. argues instead that he was entitled to presumed father status because he executed a voluntary declaration of paternity when TJ was born. Family Code section 7571, subdivision (a), provides: "[U]pon the event of a live birth, prior to an unmarried mother leaving any hospital, the person responsible for registering live births under Section 102405 of the Health and Safety Code shall provide to the natural mother and shall attempt to provide, at the place of birth, to the man identified by the natural mother as the natural father, a voluntary declaration of paternity together with the written materials described in Section 7572. Staff in the hospital shall witness the signatures of parents signing a voluntary declaration of paternity and shall forward the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed. A copy of the declaration shall be made available to each of the attesting parents." Family Code section 7573 provides: "Except as provided in Sections 7575 [rescission or motion to set aside declaration], 7576 [effect of declaration made on or before Dec. 31, 1996], and 7577 [effect of minor's declaration], a completed voluntary declaration of paternity, as described in Section 7574 [form requirements], that has been filed with the Department of Child Support Services *shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity* issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support." (Fam. Code, § 7573, italics added. See also *In re Raphael P.* (2002) 97 Cal.App.4th 716, 736-737.)

DCFS points out on appeal that the record does not contain an executed voluntary declaration of paternity, and there is no evidence that such a declaration was filed with the Department of Child Support Services. However, pursuant to Health and Safety Code section 102425, subdivision (a)(4), unmarried parents must sign a declaration of paternity before a father's name may appear on a birth

certificate. (Fam. Code, §§ 7571, 7573, 7644; *In re Liam L.*, *supra,* 84 Cal.App.4th at pp. 746-747.) T.G. is named as the father on TJ's birth certificate. An unmarried man's name on a birth certificate constitutes prima facie proof that he signed a declaration of paternity. (*In re Raphael P.*, *supra,* 97 Cal.App.4th at p. 738.) Based upon the presumption found in Evidence Code section 664 that official duty has been regularly performed, we presume that a voluntary declaration of paternity was executed and filed in accordance with the applicable statutes, in the absence of evidence to the contrary. (*Id.* at pp. 738-739.)

Family Code section 7575 establishes the means by which a voluntary declaration of paternity may be set aside. Generally, "[a] motion to set aside a voluntary declaration may be filed only *within the first two years after the child's birth* 'by a local child support agency, the mother, the man who signed the voluntary declaration as the child's father, or in an action to determine the existence or nonexistence of the father and child relationship pursuant to Section 7630 or in any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity.' (§ 7575, subd. (b)(3)(A) ['notice of motion for genetic tests under this section may be filed not later than two years from the date of the child's birth'].)" (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019-1020, italics added. See also Fam. Code, § 7646.)[4]

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[4] "(a) Notwithstanding any other provision of law, a judgment establishing paternity may be set aside or vacated upon a motion by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons if genetic testing indicates that the previously established father of a child is not the biological father of the child. The motion shall be brought within one of the following time periods: [¶] . . . [¶]

"(2) Within a two-year period commencing with the date of the child's birth if paternity was established by a voluntary declaration of paternity. Nothing in this paragraph shall bar any rights under subdivision (c) of Section 7575." (Fam. Code, § 7646.)

However, "[u]nder certain limited circumstances a court, sitting in equity, can set aside or modify a valid final judgment obtained by fraud, mistake, or accident." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1066. See also Fam. Code, § 7575, subd. (c)(4) ["Nothing in this section is intended to restrict a court from acting as a court of equity"].) Thus, an equitable collateral attack on a voluntary declaration of paternity is available on the grounds of extrinsic fraud. (*In re William K.* (2008) 161 Cal.App.4th 1, 10. See also *County of Orange v. Superior Court* (2007) 155 Cal.App.4th 1253, 1261: "In order to vacate a judgment [of paternity] after the statutorily imposed time limits, extrinsic fraud must be shown.")

Extrinsic fraud occurs when one party deprives another of his day in court, preventing him from participating in the proceeding. (*Ibid*.; see also *City and County of San Francisco v. Cartagena*, *supra,* 35 Cal.App.4th at p. 1067.) In contrast, intrinsic fraud occurs when a party is given notice and an opportunity to present his case but neglects to do so; no equitable collateral attack against a voluntary declaration of paternity is available where only intrinsic fraud is alleged. (*In re William K.*, *supra,* 161 Cal.App.4th at p. 10.)

The text of the voluntary declaration of paternity requires the mother to swear that "the man who has signed the voluntary declaration of paternity is the only possible father" of her child. (Fam. Code, § 7574, subd. (b)(5).) Although both Mother and T.G. knew T.G. was not and could not be TJ's biological father, they nonetheless executed the declaration of paternity. Mother's and T.G.'s signing the declaration was plainly fraudulent.

As previously noted, an executed voluntary declaration of paternity "establish[es] the paternity of a child and shall have the same force and effect as a

judgment for paternity issued by a court of competent jurisdiction." (Fam. Code, § 7573.) We conclude that extrinsic fraud was present in this case because H.W. was deprived of his day in court, and was prevented from objecting to the judgment of paternity being entered. There is no indication that H.W. knew until the dependency proceedings were initiated that T.G. was listed on TJ's birth certificate as the father. Indeed, H.W. stated that Mother told him after the child was born that he could be the father. She took the child to visit him and asked him for money to support the child, which he readily provided. He saw the child as much as Mother permitted, when she was able to "get away" from T.G. H.W. apparently did not know of the existence of the judgment of paternity in favor of T.G., and therefore had no occasion or opportunity to challenge it within the statutory time limits for requesting genetic testing and moving to vacate or set aside a judgment of paternity. Under these circumstances, we conclude that the juvenile court was permitted to entertain and indeed grant an equitable collateral attack on the voluntary declaration of paternity and ensuing judgment of paternity.

Having implicitly set aside the voluntary declaration of paternity and ensuing judgment, the juvenile court was then required to resolve the competing claims to presumed fatherhood status presented by T.G. and H.W. "As the Supreme Court explained in *In re Jesusa V.* (2004) 32 Cal.4th 588, 603 (*Jesusa V.*), '[a]lthough more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, "there can be only one presumed father." [Citations.]' The procedure for reconciling competing presumptions is stated in section 7612, which provides: '(a) . . . a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. [¶] (b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of

policy and logic controls.' (See *Jesusa V.*, at p. 603.)" (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1019.)

Pursuant to Family Code section 7611, subdivision (d), a man can become a presumed father by receiving the child into his home and openly holding out the child as his natural child. (See *Adoption of Michael H.*, *supra*, 10 Cal.4th at p. 1051.) H.W. declared that he had held TJ out as his natural child to his family, friends, and community. Although Mother lived elsewhere, TJ spent time with H.W.'s family, including spending extended visits with them, and H.W. sometimes took the child to school and helped with his homework. Mother said that regular visits with H.W. began when TJ was only six months old, as opposed to H.W.'s later estimate. H.W. was a nonoffending parent with regard to the Welfare and Institutions Code section 300 petition, and there were no allegations of any wrongdoing on his part. Mother, TJ, and TJ's attorney all agreed unreservedly that H.W. should be granted presumed father status.

In contrast, T.G. was found to have engaged in domestic violence with Mother, had been incarcerated numerous times, and drank alcohol almost every day. TJ did not want to live with him. Mother sharply disputed the contention made by T.G. that they all lived together as a family. While he apparently took care of TJ and his older brother at times, and he did voluntarily sign the declaration of paternity, it does not appear that the relationship he established with TJ was one that warranted preservation.

This court has no power to reassess the juvenile court's findings with regard to the credibility of witnesses or to reweigh the evidence. "Thus, we must uphold the juvenile court's factual findings if there is any substantial evidence, whether controverted or not, that supports the court's conclusion. [Citation.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.) We note that T.G. argues on appeal that, in his respondent's brief, H.W. relies on the arguments of counsel made in H.W.'s

memorandum of points and authorities regarding paternity, rather than on admissible evidence. T.G. asserts that the properly admitted evidence was insufficient to support the court's determination regarding paternity. However, the evidence upon which our review is based was properly admitted and considered by the juvenile court. This included the statement regarding parentage filed by H.W., the information for court officer filed by DCFS for the hearing on February 25, 2008, the numerous reports prepared by DCFS throughout the proceedings, and the testimony and offers of proof provided during the various hearings, particularly the hearing in February 2008. At the February hearing, the court invited counsel to submit offers of proof regarding the witnesses' intended testimony, and also asked questions of some of the witnesses.[5] The court had reviewed the alleged fathers' moving papers, allowed counsel to make offers of proof, made inquiries of the parties and counsel as necessary to gain information to assist in making its decision, and permitted counsel to argue their positions. This procedure, which was not objected to, was acceptable, as it served to expedite the hearing and to provide a less adversarial atmosphere. (See *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn. 3 [approving similar procedure in marital dissolution proceedings].) The juvenile court found, based on the evidence presented and described here, that it was in TJ's best interests to declare H.W. his presumed father. We will not interfere with the court's conclusion.

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[5] While the witnesses were not sworn prior to the court asking them questions, T.G. did not object to the informal nature of the procedure at the time and has thus forfeited the right to complain of any error. (*People v. Haeberlin* (1969) 272 Cal.App.2d 711, 716.)

DISPOSITION

The order is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.